BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

THERESA BURK	)	
Claimant	)	
VS.	)	
	)	Docket No. 225,944
PRO FIT CAP COMPANY, INC.	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the Award dated April 20, 1998, entered by Administrative Law Judge Robert H. Foerschler. The Appeals Board heard oral argument on November 17, 1998.

APPEARANCES

Daniel L. Smith of Overland Park, Kansas, appeared for the claimant. Gregory D. Worth of Lenexa, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for bilateral arm injuries that developed over an extended period of time due to repetitive mini-traumas. The parties stipulated that the appropriate date of accident for this period of injury was March 20, 1997. The Judge concluded that claimant had a 25 percent permanent partial general disability.

Claimant contends the Judge erred by finding that she had failed to prove a 100 percent task loss for the permanent partial general disability formula. Additionally, claimant contends the Judge erred by finding that claimant had the ability to earn a minimum wage.

Finally, claimant contends that she has proven a 100 percent permanent partial general disability.

Conversely, respondent and its insurance carrier contend claimant failed to prove a tasks loss because she failed to adequately identify the work tasks that she performed in the 15-year period before her accidental injury and, therefore, failed to obtain a doctor's opinion whether any individual task could or could not now be performed. Respondent and its insurance carrier contend that claimant retains the ability to earn a comparable wage and argue that a comparable wage should be imputed because claimant has allegedly failed to make a good faith effort to find appropriate employment. Finally, respondent and its insurance carrier contend that claimant's permanent partial general disability should be based upon the 6 percent functional impairment rating provided by Dr. Storm.

Nature and extent of injury and disability is the only issue before the Board on this Appeal.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

(1) Ms. Burk developed repetitive use injuries to both hands and arms while working as a seamstress making baseball caps for Pro Fit Cap Company, Inc. As indicated in their submission letters filed with the Division, the parties stipulated that the injuries arose out of and in the course of employment with Pro Fit. Further, the parties agreed that March 20, 1997, was the appropriate date of accident for this claim.

(2) In the fall of 1996, after working for Pro Fit for approximately one year, Ms. Burk began experiencing difficulties with her hands and arms.

(3) In January 1997 Ms. Burk's job duties changed. Before that time, Ms. Burk had been a utility worker performing different seamstress jobs in the plant as needed. But in January 1997, the company transferred her to operating the visor profile machine on a permanent basis.

(4) Because of the reduction in the base wage that occurred when Ms. Burk was transferred out of the utility worker position, she walked off the job. Later that January, at her union's request Pro Fit reluctantly accepted Ms. Burk back to work. According to the company's general manager, Mel McMurtry, Ms. Burk had angrily walked off the job on at least one or two earlier occasions. By a document dated January 17, 1997, the company stated it was reinstating Ms. Burk but warned her that such conduct would not be tolerated in the future.

(5) In March 1997 Ms. Burk complained of her symptoms and requested medical treatment. On March 20, 1997, Ms. Burk first saw Dr. Donald E. Banks. Although the doctor permitted Ms. Burk to continue to work, he limited her to light duty activities and

restricted her from repetitive hand and arm motions. Also, the doctor placed her in splints and prescribed physical therapy and anti-inflammatory medicines.

(6) Upon receiving the doctor's restrictions, the company then placed Ms. Burk on light duty that Dr. Banks had approved. The company asked Ms. Burk to train new employees on the "close visor" job. But she complained that ripping seams to correct mistakes hurt her wrists. The company asked her to inspect visors. But she complained that picking up the visors hurt her wrists. The company asked her to perform janitorial duties. But she found that job demeaning. She refused to clean the bathrooms and complained that emptying the trash hurt her hands.

(7) Before going on light duty, Ms. Burk was paid on a quota basis with a base hourly wage guarantee. But for light duty, the company only paid Ms. Burk the reduced rate of $5.25 per hour. According to Ms. Burk, there was not enough work to keep her busy and she worked less than full time while on light duty. According to Mr. McMurtry, she worked 40 hours per week during light duty.

(8) Ms. Burk continued to work for Pro Fit until either April 21 or April 22, 1997. At that time she again left the plant before the end of the work day. According to Ms. Burk, she was upset, hurting, and felt that she could not clean the bathrooms or empty the trash. According to Mr. McMurtry, Ms. Burk became angry as she thought he doubted her statement that she had hurt her wrist pulling a new trash bag from its case.

(9) On April 25, 1997, at Dr. Banks' referral, Ms. Burk saw Dr. Vito J. Carabetta. After conducting an EMG that showed moderate left carpal tunnel syndrome, mild right carpal tunnel syndrome, and mild compression neuropathy of the ulnar nerves at both wrists, Dr. Carabetta referred Ms. Burk to Dr. Brad W. Storm. Dr. Storm first saw Ms. Burk on June 2, 1997. On June 17, Dr. Storm performed median and ulnar release surgery on the left wrist. On July 8, he performed similar surgery on the right wrist.

(10) According to the medical records, on June 30, 1997, Dr. Storm released Ms. Burk to return to one handed work only. On July 15, 1997, Dr. Storm released Ms. Burk to work without restrictions. In early August 1997, the insurance carrier notified Ms. Burk that it was terminating her temporary total disability benefits.

(11) At that point, Ms. Burk returned to Pro Fit and reapplied for work. Because of her history of becoming angry and walking off the job, she was not rehired.

(12) When she testified at the Regular Hearing conducted in January 1998, Ms. Burk was not employed. And she had not worked since leaving Pro Fit in April. Besides applying at Pro Fit, since being released to return to work Ms. Burk had applied at only two other potential employers - a convenience store and a statuary company. But she had applied for SSI benefits and was planning to apply for social security disability benefits.

(13) After the Regular Hearing, the insurance carrier offered Ms. Burk job placement services with a rehabilitation specialist employed by Intracorp. Those services were refused as Ms. Burk allegedly intended to seek vocational rehabilitation services from the State of Kansas.

(14) At her attorney's request, board certified orthopedic surgeon Dr. Edward J. Prostic examined Ms. Burk on November 10, 1997. In addition to post-operative bilateral carpal tunnel syndrome, Dr. Prostic found that Ms. Burk has symptoms compatible with cubital tunnel syndrome at each elbow and thoracic outlet syndrome. Additionally, the doctor found symptoms compatible with tendinitis and ganglion cysts at her wrists. The doctor believes Ms. Burk has a 25 percent whole body functional impairment due to her work-related injuries and that she should avoid repetitious forceful use of either hand and activities that require more than minimal use of her hands at or above shoulder level.

(15) Dr. Storm, who is board certified in both plastic and hand surgery, testified that he believes Ms. Burk has a 6 percent whole body functional impairment as a result of the bilateral carpal tunnel syndrome. He did not find evidence that Ms. Burk had either cubital tunnel or thoracic outlet syndrome. Although he did not place permanent medical restrictions on her, the doctor believes that Ms. Burk should avoid vibratory equipment and repetitive forceful use of her hands.

CONCLUSIONS OF LAW

(1) The Award should be affirmed.

(2) Because hers is an "unscheduled" injury, Ms. Burk's permanent partial general disability is determined by K.S.A. 1996 Supp. 44-510e. That statute provides:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk[1] and Copeland.[2] In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that would pay a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the injury.

(3) The Appeals Board agrees with the Judge's conclusion that Ms. Burk failed to prove the percentage of her former work tasks that she is now unable to perform as a result of her work-related injuries. Rather than breaking the various jobs down into individual work tasks, Ms. Burk gave a broad description of her seamstress jobs and some of the physical requirements. The record indicates that during the 15-year period before her accident, Ms. Burk worked as a seamstress first at upholstering caskets and later at making ball caps. The record also indicates that those jobs generally required forceful gripping and repetitive use of the hands.

(4) But the record does not provide a breakdown of those jobs into work tasks, although we do know that Ms. Burk worked at least three different jobs as a utility worker for Pro Fit, one of which involved the operating and loading of the visor machine. We also know that at least one of the jobs required installing new sewing machine needles and at least one of the jobs involved working with tickets. But we do not know what Ms. Burk actually did in those various jobs, where she got the materials she worked with, what she actually did with those materials, what was required to operate any of the machines that she may have worked on, how she kept track of the items she completed, or what she did with the completed items. According to Mr. McMurtry, the visor profile machine only required her to load it.

(5) In proving a tasks loss under the permanent partial general disability formula, a job must be broken down into its individual tasks and a physician must then provide an opinion regarding the extent that a worker has lost the ability to perform those former tasks. The doctor may review each individual work task and express an opinion whether the worker can perform that task or the doctor may review the entire list of the tasks and provide a percentage of loss. Nonetheless, there must be an adequate foundation for the doctor's opinion and that necessarily includes the doctor having a description of each individual task. Therefore, a general description of a worker's job does not suffice under the present permanent partial general disability definition.

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[1] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995)

[2] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997)

(6) It is Ms. Burk's burden to prove that she has exerted a good faith effort to find appropriate employment. And a token effort will not suffice.[3] Considering that Ms. Burk refused job placement services and exerted only minimal efforts to find employment, the Appeals Board concludes that she has failed to make a good faith effort to find employment. Therefore, a post-injury wage should be imputed for the permanent partial general disability formula.

(7) The Appeals Board finds that Ms. Burk retains the ability to earn the federal minimum wage, or $206 per week. Comparing $206 to $259, the wage that the parties stipulated Ms. Burk was earning at the time of her accident, yields a 20 percent difference in pre- and post-injury wage.

(8) The Appeals Board affirms the Judge's finding that Ms. Burk has sustained a 25 percent whole body permanent functional impairment as a result of her accident. Averaging the 0 percent tasks loss with the 20 percent wage loss yields 10 percent. Therefore, Ms. Burk's permanent partial general disability is 25 percent.

AWARD

WHEREFORE, the Appeals Board affirms the Award dated April 20, 1998, entered by Administrative Law Judge Robert H. Foerschler.

IT IS SO ORDERED.

Dated this _____ day of February 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Daniel L. Smith, Overland Park, KS
Gregory D. Worth, Lenexa, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director

[3] Cooper v. Mid-America Dairymen, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* ___ Kan. ___ (1998).